Petition

No. 81 6171

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

ALFRED BROOKS,

PETITIONER

-vs-

THE STATE OF OKLAHOMA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ALFRED BROOKS, #91884
Stringtown Correctional Center
Post Office Box 270
Stringtown, Oklahoma 74569

Petitioner Pro Se

QUESTIONS PRESENTED FOR REVIEW

1. When two (2) people are simultaneously robbed inside an automobile, and alter simultaneously shot, causing the death of one victim, does the number of victims of a criminal act(s), determine the validity of Petitioner's double jeopardy claim under the 5th Amendment and collateral estoppel imbodied in the 14th Amendment?

2. Whether guilty plea was involuntary due to an unconstitutional deprivation of reasonable and effective assistance of counsel as a result of, defense attorney persistant advise to 'plead guilty' to an offense that the attorney knew, is the supporting underlining felony in his client's resent felony murder conviction?

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THE STATE OF OKLAHOMA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Alfred Brooks, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on December 21, 1981.

OPINION BELOW

The Court of Appeals entered its opinion affirming the conviction of Petitioner on December 21, 1981. No petition for rehearing was filed. A copy of the Opinion, which is not for routine publication, is attached as Appendix A.

JURISDICTION

On December 21, 1971 the Court of Appeals entered judgment affirming the convictions of Petitioner for Robbery with Firearms, and Assault and Battery With a Deadly weapon With Intent to Kill, The jurisdiction of this court is under Title 28, United States Code, Section 1254(1).

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CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 5:

> "No person shall * * * be subject for the same offence to be twice put in jeopardy in life or limb; nor be deprived of life, liberty, or property, without due process of law; * * *.

United States Constitution, Amendment 6:

> "In all criminal prosecutions, the accused shall enjoy the right * * * have the Assistance of Counsel for his defence.

United States Constitution, Amendment 14:

> " * * * * * . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

O"lahoma Constitution, Artical II, Section 21

> * * * *. Nor shall any person be twice put in jeapardy of life or liberty for the same offense....."

Oklahoma Statute Annoted, Title 22, Section 522

> "When the defendant shall have been convicted or acquitted upon an indictment or information, the conviction or acquittal is a bar to another indictment or * * *, or for an offense necessarily included therein, of which he might have been convicted under that indictment or information.

STATEMENT OF THE CASE

Petitioner and a "John Doe" picked up two girls, robbed them simultaneously in the car, then took them into a field and shot both of them, killing one and wounding the other. The robbery and shooting of the first girl resulted in conviction of Petitioner under the Oklahoma felony murder statute. The robbery and shooting of the second girl (who survived), were the basis of the ch-rge upon which Petitioner entered pleas of guilty and which he attacks in this action for Petition For Writ Of Certiorari.

In reference to the murder conviction's underlining-robbery, the "ultimate fact" challenged on that particular issue doing jury trial was "whether he was one of the men who robbed the victim(s)."

In addition, the instruction number three (3) given to jurors by trial court during murder trial, states in part:

> "You will first determine from the evidence under these instructions and beyond a reasonable doubt whether the "crime" of Murder in the First Degree has been committed.
> In this case, the essential elements of the crime that must be proved beyond a reasonable doubt are:
>
> (1) That the killing of a human being by another has occurred.
> (2) That the killing was without authority of law.
> (3) That the killing was with the premeditated design to effect the death of the person killed.
> (4) That the killing was perpetrated by one or more persons committing or attempting to commit armed robbery."
>
> If you find from the evidence and beyond a reasonable doubt that the 'crime' of Murder in the First Degree, as defined by these instructions, has been committed, you will next determine who committed the 'crime'. (emphasis my own)

The Jury Instruction #1, and the Murder Information Sheet both implies in part:

> • • • • • • • • • The defendant is charged with the crime of Murder in the First Degree. The Information alleges that on or about • • • • effect the death of one Judy Webb, did, while being engaged in committing or, attempting to commit, the crime of Robbery With Firearms, by means of shooting the said Judy Webb, causing wounds from which she did die. (EMPHASIS MY OWN)

In the State District Court, petitioner raised three (3) propositions, the second of the three propositions were not contested, that second proposition pertained to the applicablity of MANNA V. NEW YORK, 432 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195, to the Petitioner's case, in that, by pleading guilty, petitioner did not waive his right to claim that the information should have been dismissed

under the double jeopardy clause of the 5th Amendment to the United States Constitution.

The first district court proposition raised, stated that:

> The Ultimate facts and circumstances of CRF-74-4416 and CRF-74-4417 are identical to those litigated in Petitioner's Capitol Murder Trial, which was supported by underlining felony.
>
> Sub.'d...(a)...
>
> ASHE V. SWENSON, 397 U.S. 436, 90 Sct. 1189, 25 L.Ed.2d 469; SIMPSON V. FLORIDA, 402 U.S. 384, 91 S.ct. 1810, are both applicable to the case at bar, in that: Once jury determine Petitioner was one of the robbers, the State was barred by collateral estoppel imbodied in the Fifth Amendment and Due Process of the 14th Amendment from haling him back before the court with identical evidence, to litigate those same issue again for a succession prosecu-tion.
>
> Sub.'d...(b)...
>
> Judged on its face - this case CRF-74-4416 and CRF-74-4417, are ones which the State may not constitutionally prosecute.

The third district court proposition raised, stated that:

> Petitioner's guilty plea was involuntary, in that his 14th and 6th Amendment Rights of the United States Constitution were violated when he was denied due process of the law, and effective assistance of counsel, plus, he was cocerced into pleading guilty.

The District Court of Oklahoma County made the following findings and conclusions of law: "From a view of the court files in these cases and a review of the Petitioner's claims in his Application, a finding that defense was incompetent at trial or on direct appeal should not be forthcoming. Counsel at trial raised defense and filed and argued motions that were proper under the facts and the circumstances. It cannot be said that the trial was a farce, mockery of justice or was shocking to the consience of the reviewing court. Counsel for Petitioner on direct appeal raised all issues which in counsel's opinion were not frivilous and was diligent in his appeal on behalf of the Petitioner that he was successful in having the sentnece in CRF-74-4415, having been rendered by a jury , reduced from death to life imprisonment. [App. K , page #2, prgh. #3] The Petitioner's second major allegation, that of being coerced into entering pleas of guilty in CRF-74-4416 and CRF-74-4417 is so meritless as to hardly require recognition,

as evidence by the transcript of proceedings, transcibed on the 10th of October, 1976, when the Petitioner entered his pleas of guilty before the Honorable. [See, App. B page #2, pragh #4] The District went on to say that Petitioner's double jeopardy claim, "fails in that the victim in CRF-74-4415 was a different person from the victim in CRF-74-4416 and CRF-74-4417 and therefore the pr ivilege of immunity from double jeopardy does not arise."

March 21, 9181, Petitioner filed his 'Appeal from Denial of Post Conviction Relief', with in the Court of Criminal Appeals of the State of Oklahoma.

Petitioner's district court propositions were listed as "Issues Presented For Examination", and individually argued under seperate 'Assignmentof Error'.

The first assignment of error stated in part, that:

> "The Lower Court's adverse ruling on petitioner's ineffective assistance of counsel claim requires a reversal by this court, on account of several errors. Some of those errors are as follows: The lower court stated that,
>
> > "The standard for measuring the adequacy of counsel is whether the trial was rendered farce, mockery of justice or was shocking to the consicence of the reviewing court."

Petitioner argued that he presented numerous U.S. Supreme Court, Federal and State case authorities which support his opposition to the "sham and mockery" standard. He stressed the applicability of the following cases to his own: GIDEON V. WAINWRIGHT, 374 U.S. 335, 339, 83 S.Ct. 792____, 9.Ed.2d 799 (1963), over ruling BETTA V. BRADY, 316 U.S. 445, 62 S.Ct. 1252, 86 L.ed 2d 799 (1943); McMANN V. RICHARDSON, 397 U.S. 759, 90 S.Ct. 1441, 25 L.ed 2d 763 (1970). In addition, Petitioner contend that: "the United States Court of Appeals For the Tenth Circuit abandoned its sham and mockery standard within a recently un-published opinion of DYER V. CRISP, No. 78-1772. In the body of that opinion the Tenth Circuit Court stated:

> " * * * . The Sixth Amendment has been interppreted as guaranteeing the right to effective assistance of counsel. McMANN V. RICHARDSON, 397 U.S. 759, 771 (1970). In following this mandate, the majority of the circuits hold that the Sixth Amendment requires that assistance of counsel be measured against a standard higher than "sham and mockery" and rise to the level of reasonably competent assistance of counsel.
>
> The move toward this more demanding standard has been slowly evolving. * * * * * . It seems appropriate, nevertheless, to accurately state the constitutional test. The Sixth Amendment demands that defense counsel exercise the skill, judgment and diligence of a reasonable competent defense attorney."

The Lower Courts committed a reversable error by disregarding the above court standards which were more explicitly covered and strengthened by case laws.

The remander of the Lower Court's findings of fact and conclusions of law towards petitioner's ineffective counsel claim, does not address the issue and facts presented on this particular claim, of the Petitioner.

See....the below segments is from page # 2 of Lower-Court's memo on Petitioner's application for post conviction relief. (Also see Attached Appendix # 2, page 2)

> "* * * * . Counsel at trial raised defense and filed and argued motions that were proper under the facts and circumstances. It cannot be said that the trial was a farce, mockery of justice or was shocking to the conscience of the reviewing court. Counsel for Petitioner on direct appeal raised all issues which in counsel's opinion were not frivilous and was so diligent in his appeal on behalf in the Petitioner that he was successful in having the sentance in CRF-74-4415, havinb been rendered by a jury, reduced from death to life imprisonment." (emphasis my own)

As you can notice from the above statement, the lower court erred in discussing only the effectiveness of counsel(s) during the murder trial and direct appeal of capitol felony conviction, it also erred in disposing of petitioner's application for Post-Conviction Relief without making findings of fact and conclusions of law with regard to all of the issues presented by petitioner in his application; Counsel's conduct during trial and appeal proceedings are irrelvant in the case at bar. Because that is not the issue. The issue, is

> "did defense counsel exercise the skill, judgment and diligence of a reasonable competent defense attorney on the 13th day of October 1976 when he told and allowed petitioner to enter a plea of guilty on the case(s) at bar, AND was petitioner's guilty plea involuntary, in that his 14th and 6th Amendment Rights of the United States Constitution were violated when he was denied due process of law, and effective assistance of counsel, and was he cocerced into pleading guilty?

MATTER OF BUTLER, 599 P.2d 1311 (1979), is very applicable to the case at bar, especially on the issue of "ineffective assistance of counsel'. In the MATTER OF BUTLER, supra, Mr. Butler contended that he was being held in violation of constitutional rights under the double jeopardy clause, and therefore, the charges

and conviction should be dismissed. Butler was initially charged with first-degree robbery and first-degree assault. Pursuant to a plea bargain, Mr. Butler pleaded guilty to both charges on August 28, 1978, in exchange of a reduction of the charges from first-degree to second-degree and the prosecution's promise to recommend that the sentence run concurrently and that a presentence investigation be ordered. The plea was accepted, and Mr. Butler was sentance to 10 years on each count to run concurrently.

Mr. Butler argues that the assault charge was necessarily included in the robbery charge, and, therefore, he was twice placed in jeopardy for the same offense in violation of the federal and state constitutions.

Further, he claims he was denied effective assistance of counsel because his lawyer allowed him to plead guilty to both offenses dispite the double jeopardy problem. In support of his petitioner, Mr. Butler has appended the statement of the prosecuting attorney indicating the assault arose directly out of the robbery of the victim. Also read, LAUNIUS V. UNITED STATES, 575 F2d 770 (1978). Washington's Court of Appeals held; "since Mr. Butler's convictions and sentence on both offenses violated the double jeopardy provisions of the State Constitution, his petition must be partially granted because the assault merged into the robbery. Accordingly, the conviction and sentence on the assault count are ordered vacated; and the conviction and sentence of robbery are affirmed."

The ineffective assistance of counsel claims of BROOKS and MATTER OF BUTLER, supra, are almost identical. However, Brooks alleges that his attorney knows that the facts of the case at bar "was fully litigated in privious murder trial," thus, double jeapordy barred prosecution on the charge of Robbery With Firearms, and assault. As offer of proof, see guilty plea transcript where in petitioner's attorney (whom also represented petitioner during murder trial) admitted to the court that the facts of this case was litigated in murder trial. See .....Guilty Plea Tr. page 16, lines 13 thru 18.....

> MR. PORTER: If the Court Please, I would only say this, your Honor: The Defendant, in a previous case, which was a Murder case that grew out of the same set of facts in this case, prior to trial completely attempted to cooperate with the Police Department and told them exactly what occured and how it occured. (emphesis my own)

The prejudicial consequences of Petitioner's plea of guilty were reasonably foreseeable by counsel prior and during court proceeding. TOLLETT V. HENDERSON, 411 U.S. 258, 269, 93 S.ct. 1602, 36 L.Ed.2d 235 (1973). Relief should be granted where prejudice was foreseeable. MARZULIOR V. STATE of MARYLAND, 561, F2d 546.

Petitioner's second assignment of error said that it, "basicly pertains with the Lower-court's findings that state:

> "The remainder of the Petitioner's most lengthy Application is didicated to the allegation that he was subjected to double prosecution in CRF-74-4416 and CRF-74-4417 because the crime arose out of the same chain of events. This allegation fails in that the victim in CRF-74-4415 was a differenct person from the victim in CRF-74-4416 and CRF-74-4417 and therefore the privilege of immunity from double jeopardy does not arise."

The Petitioner opposes the above qucte of the district court. Because in Petitioner's case, two women were robbed ans shortly afterwards shot simultaniously. He was charged and convicted of killing the deceased while committing or attempting to commit robbery. During trial, and testimony to the facts of the robbery was litigated by the surviving woman whom incidently, was the State's only witness to the crime.

In reference to the murder conviction's underlining-robbery, petitioner stresses that the "ultimate fact" challenged on that particular issue during jury trial was "whether he was one of the men who robbed the victims." And the same ultimate facts would have to be presented and/or challenged to the case at bar during any court trial proceedings.

It is clear from the trial transcript, direct examination testimony of State's witness Karen Tramphton, that the question Petitioner's identity was 'fully litigated' and that the facts and circumstances of the robbery of both women were intorduced at trial. That testimony does not disjoined the murder case and case at bar, thus making them available for seperate punishment. However, the testimony is a mixture of both cases, whore in the greater is supported by the lesser - thus rendering them as "only one".

The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in

BLOCKBURGER V. UNITED STATES, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed.2d 306 (1932)

> "The applicable rule is that where the same act or transaction constitutes a violative of two distanct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not."

Also see, BROWN V. OHIO, 432 U.S. 161, 97 S.Ct. 221 at 2223, ___L.Ed.2d___: MARSHALL V. UNITED STATES, 299 F.wd 141 (19th Cir. 1962); CREED V. UNITED STATES, 283 F.2d 646 (10th Cir. 1060); BOWEN V. STATES, Okl.Cr., 586 P.2d at 69.

On the 12th day of May, 1980, the Court of Criminal Appeals for the State of Oklahoma, filed its "Order Affirming Denial Of Post-Conviction Relief" (See Appendix C), stating in the second and third paragraphy of its one page order:

> After considering the issues raised on appeal and being fully advised in the premises, this Court finds that the denial of post-conviction relief should be and hereby is affirmed.

August 21, 1980, Petitioner filed a "Petition For Writ of Habeas Corpus," pursuant to 28 U.S.C. 2254, in the United States District Court for the Western District of Oklahoma. Petitioner raised the following grounds and Supporting Facts:

> GROUND ONE: The ultimate facts and circumstances of CRF-74-4417 are identical to those litigated in Petitioner's capitol murder trial, which was supported by the case at bar--as the underlining robbery; therefore, judge on its face, CRF-74-4417 is an information which the State may not constitutionally prosecute.
>
> SUPPORTING FACTS: Prior to my conviction on the case at bar, I was convicted of killing a deceased "while committing or attempting to commit robbery". Two people were robbed and shot, the surviving person was the State's only witness to the crime, and testified that I was one of the men who simultaneously robbed them. After my conviction on felony murder of the deceased, I was forced to answer the robbery charge on the surviving person.
>
> GROUND TWO: The ultimate facts and circumstances of CRF-74-4416 are identical to those litigated in Petitioner's capitol murder trial, therefore judge on its face, CRF-74-4416 is an information which the State may not constitutionally prosecute.

SUPPORTING FACTS: In a previous felony murder trial, state's sole witness to the crime testified that I was one of two me who robbed and shot her and the deceased simultaneously. I was convicted. And later brought back before the court on information charging me with shooting the second person. The ultimate facts are the came in both the 'Shooting With Intent To Kill' and "Felony Murder and they were litigated and challenged during felony murder trial. Those same ultimate facts would have to be presented and/or challenged in the case at bar during any court or trial proceedings. Therefore, the State would have to reproduce the evidence and testimony submitted in petitioner's prior murder trial inorder to convict me of shooting the second person.

GROUND THREE: My guilty plea did not waive my right to claim that the informations (CRF-74-4416 & CRF-74-4417) should have been dismissed under the double jeopardy clause of the U.S. Constitution.
SUPPORTING FACTS: There are numerous case law which supports ground #3, I am willing to cite said case law upon the request of his honorable court.

GROUND FOUR: During the guilty plea court proceedings, my counsel was very in-effective in assisting and giving me proper legal advise, and he cocerced me into pleading guilty.
SUPPORTING FACTS: My attorney continuously told me to plead guilty to an offense which was the supporting underling felony in my felony murder conviction, wherein he was the defense counsel. As offer of proof, the guilty plea transcript reveals that my attorney admitted to the court that the facts of the cases at bar was litigated in murder trial.
See.....Guilty Plea Tr., page 16, lines 13 thru 18.....

> MR PORTER: If the Court Please, I would only say this your Honor: The Defendant, in a previous case, which was a Murder case that grew out of the same set of facts in this case, prior to trial completely attempted to cooperate with the Police Department and told them exactly what occured and how it occurred." (emphesis my own)

The U.S. District Court For The Western District, filed its "Opinion and Order", on November 20, 1980, (see, appendix D). On page #3, of Appendix # D, that court stated:

"In Harris v. Oklahoma, 433 U.S. 682 (1977), petitioner had been convicted under Oklahoma's felony murder statute and was later brought to trial and convicted of the felony which was the basis for the felony murder conviction. The second conviction was affirmed by the Court of Criminal Appeals of the State of Oklahoma,

but reversed by the Supreme Court of the United States. In the Supreme Court opinion, the following is stated:

> "When, as here, conviction of a greater crime, murder, cannot be had witout conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one."

In this case, had there been only one victim , or if the subsequent charges were based upon the robbery and the shooting of the girl whose death gave rise to the earlier felony murder conviction, Harris would bar the subsequent prosecutions. Here, however, the felony murder conviction was not, and could not have been, based upon the robbery and the shooting of the second girl, who did not die. Thus, the Double Jeopardy Clause does not bar subsequent prosecution for the offense against that second victim.

Although petitioner does not specifically raise the issue, it should be noted that the Double Jeopardy Clause also does not bar a single trial for multiple offenses arising out of one transaction if each offense rest on different criminal elements. United States v. Jackson, supra; Smith v. Gaffney, 462 F.2d 663 (10th Cir. 1972)."

The Federal court went on to refute the existence of any merits to the remainder of Petitioner's grounds,.....declaring that Petitioner, "was fully aware of his rights, that he answered all questions coherently and in full, with obvious understanding of the meaning of the questions and of his answers to them." (Appendix D , page 4, grgh. 1) . . . . . Just as Petitioner's plea of guilty were clearly free and voluntary, his counsel was effective in representing him (Appendix D , page 4, pragh. 3). . . . . Petitioner raises no question of fact. Therefore, no evidentiary hearing is appropriate and none will be held. Based upon the foregoing, it is clear that petitioner's asserted grounds for relief herein are without merit and that therefore his Petition For Writ of Habeas Corpus should be dismissed."

REASONS FOR GRANTING THE WRIT

1. The number of victims of a criminal act(s), does not necessarily in its self, determine the validity of Petitioner's double jeopardy claim.

Each of the lower courts reject Petitioner's double jeopardy contention simply because there was more than one victim. However, none of the courts or state's responses mention an additional fact that could sustain a second conviction, although the pressence of an additional fact would be necessary at a second trial. Petitioner relied upon Harris v. Oklahoma, 433 U.S. 682, 52 L.Ed.2d 1054, 97 S.Ct. 2912, as a controling authority, while on the otherhand, the Federal Court said, regarding Harris, supra:

> "In this case, had there been only one victim, or if the subsequent charges were based upon the robbery and the shooting of the girl whose death gave rise to the earlier felony murder conviction, Harris, would bar the subsequent prosecutions." (Appendix D, page 3, pragh 2)

Furthermore, "* * * the Supreme Court held that the test for idenity of offrnses is whether the same evidence is required to sustain each offense. Where each offense requires proof of a fact not essential to the other, an accused may be convicted of both offenses", said the Tenth Circuit Court of Appeals (Appendix A, page 2, pragh 5), quoting from Blockburger v. United States, supra. The Tenth Circuit then conclude its comparsion of Petitioner's case to Blockburger, supra, by stating:

> "It is clear that the crimes committed against the second victim do not fall with in the double jeopardy standards spelled out in Blockburger."

Petitioner respectfully states to the contrary, that, 'if his case does not fall with in the double jeopardy standards spelled out in Blockburger, supra, then, exactly what essential fact 'not' required in first trial.....would indeed be required to sustain the second offense?' What new testimony, evidence or essential fact can prosecutix bring forth that has not already been brought forth? One of the essential underlining facts in the murder trial was:

> "That the killing was perpetrated by one or more persons committing or attempting to commit armed robbery."

The murder information sheet and jury instruction (Appendix ___), does not imply that the murder was committed while defendant was robbing or attempting to rob

Judy Webb. Nor does it specify, 'while robing or attempting to rob Karen Trampton.' It simply states, "while being engaged in committing or, attempting to commit, the crime of Robbery With Firearms." Therefore, a general verdict of guilty did not reveal whether the jury found the defendant guilty of robbing one or both women. And Petitioner alleges that he is unaware that such a determination is necessary by trial court. UNITED STATES V. STANLEY, 597 F.2d 866 (1979) at 871. In addition, the above segment from instructions number (3) demands the juriors to make a determination of, whether or not somebody was robbed or almost robbed: and because of the broadness of the above instruction no. 3, it is clearly an assumption, as to whether the juriors believed both victims were robbed, or only one victim robbed. And if we assume that the minds of some juriors believed, beyond a reasonable doubt, that only one of the victims were robbed (or almost robbed), then, which victim do we assume juriors believed was robbed? It has long been ruled in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469, where six poker players were robbed, the testimony of one of the victims concerning the identiy of the accused, the prosecution was barred from trying him separately upon the robbery of each of the six victims because all six robberies require the same evidence to sustain the offenses. Petitioner believes that the record proves that the robbery and shooting of deceased also were the base of the conviction challenge herein.

Before making a judgment on Petitioner's double jeopardy issue, the appeals court should examine the statutory provisions of each offense by some criterion which meets the Blockburger, supra, test. An appropriate test applied to the facts of each case, will provide a accurate determination on the validity of a double jeopardy claim, in contrast, to the finding of how many victims are involved.

2. The guilty plea was involuntary due to an unconstitutional deprivation of reasonable and effective assistance of counsel as a result of, defense attorney persistant advise to 'plead guilty' to an offense that the attorney knew, is the supporting underlining felony in his client's resent felony murder conviction.

Approximately June of 1979, Petitioner wrote his attorney a letter requesting the filing of a Motion to Dismiss pending charges which included

CRF-74-4416 and CRF-74-4417, upon 'double jeopardy grounds' and 'failure to provide petitioner a speedy trial." However, petitioner received no acknowledgement from his retained counsel. September or 1979, Petitioner wrote another letter to his attorney regarding aforesaid request, but again no response from his attorney.

On the mourning of October 13, 1979, Petitioner met his attorney in the district court room for the first time since February of 1976 (during murder sentencing proceeding). Petitioner asked his attorney, 'if he received the two letters requesting motions of double jeopardy and denial of speedy trial be filed? "No," replied Petitioner's counsel, "don't worry about any letters - the State can and is ready to try you on all the pending charges, and you would be a fool to go to trial on any of the charges. The best thing todo is plead guilty", declared Petitioner's attorney.

The attorney continued explaining that he had negotiated a plea for the defendant. But the defendant was persistent in not accepting any plea bargains and continued to maintain his belief that pending charges (including CRF-74-4416 and 4417) should be dismissed on double jeopardy grounds and/or denial of speedy trial grounds. Consequently, counsel was granted his request for additional time to consult with Petitioner. Afterwards, the Petitioner, his counsel and state prosecutor all met together for further discussion on whether or not petitioner should plead guilty. "Don't be a damn fool!," counsel told Petitioner, "You can get 99 years for these charges and that is what the State will recommend if you go to trial." harshly stated counsel while prosecutor confirmed the statements. "The State can use your own testimony (which was given during murder trial) against you," added the attorney. Subsequently Petitioner withdrew his not guilty plea and entered a plea of guilty to the charges.

An attorney continuously advicing his client, "to plead guilty to an offense which was the supporting underlining felony in his client's resent felony murder conviction', that advice can no way be considered the advice of a lawyer with ordinary training and skill in the criminal law.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that a writ of certiorari should issue to review the judgment of the United States Court of Appeals.

Respectfully submitted,

ALFRED BROOKS, #91884
Petitioner Pro Se
Stringtown Correctional Center
Post Office Box 220
Stringtown, Oklahoma 74569

VERIFICATION

I, Alfred Brooks the Petitioner here in, do hereby declare upon my oath that I transcribe to foregoing Writ of Certiorari, and that the contents there in are true and correct to the best of my knowledge belief and understanding.

Alfred Brooks, #91884
Petitioner Pro Se

NOTARY PUBLIC

Subscribe and sowrn to before me on this 1st day of February 1982.

Notary Public: _____

My Commission Expires: _____

PROOF OF SERVICE

I, Alfred Brooks, did on this 2d day of February, 1982, mail a true and correct copy of the foregoing Petition For Writ Of Certiorari to Attorney General, Jan Eric Cartwright, State Capitol Building, Oklahoma City, Oklahoma 73105, postage prepaid.

Alfred Brooks, #91884

Appendix

12-21-81

80-2322

United States Court of Appeals

For the Tenth Circuit

SLIP OPINION

EXHIBIT A

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
DEC 21 1981
HOWARD K. PHILLIPS
Clerk

ALFRED BROOKS,

Petitioner-Appellant,

v.

NORMAN B. HESS, Warden and JAN ERIC CARTWRIGHT, Attorney General of the State of Oklahoma,

Respondents-Appellees.

No. 80-2322

Appeal from the United States District Court
For the Western District of Oklahoma
(D. C. No. Civil 80-962-D)

Submitted on the briefs pursuant to Tenth Circuit Rule 9:

Alfred Brooks, pro se.

Jan Eric Cartwright, Attorney General, and Michael Avant-Pybas, Assistant Attorney General, the State of Oklahoma, Oklahoma City, Oklahoma, for Respondents-Appellees.

Before BARRETT, HILL and McKAY, Circuit Judges.

PER CURIAM.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this

appeal. See Fed. R. App. P. 34(a); Tenth Circuit R. 10(e). The cause is therefore ordered submitted without oral argument.

This is an appeal from an order of the district court for the Western District of Oklahoma dismissing appellant's petition for a writ of habeas corpus.

The basic facts are not in dispute. Appellant and a "John Doe" picked up two girls, robbed and shot them, killing one and wounding the other.

Appellant was tried by a jury, convicted of felony-murder with respect to the first victim and sentenced to life imprisonment. That conviction is not challenged here. Subsequently appellant was convicted upon a guilty plea of assault and battery with intent to kill the second victim, and an additional charge of robbery with firearms as to the second victim who survived the attack.

After exhausting state remedies, appellant instituted habeas corpus proceedings in the district court claiming that the second convictions were barred by double jeopardy, that his attorney provided ineffective assistance of counsel, and that, by pleading guilty, he did not waive his right to claim double jeopardy. The district court denied relief and this appeal followed.

Appellant first argues that the subsequent convictions for assault and battery and robbery were barred by double jeopardy because he contends that they arose out of the same continuous act which resulted in the prior conviction for felony-murder. In Blockburger v. United States, 284 U.S. 299 (1932), the Supreme Court held that the test for identity of

offenses is whether the same evidence is required to sustain each offense. Where each offense requires proof of a fact not essential to the other, an accused may be convicted of both offenses, though the charges arise out of the same acts. Id. See also Goldsmith v. Cheney, 447 F.2d 624 (10th Cir. 1971). It is clear that the crimes committed against the second victim do not fall within the double jeopardy standards spelled out in Blockburger. It is obvious that the elements required to convict for assault and battery with intent to kill committed against a second victim are not the same as those required to sustain a conviction for the felony-murder of the first victim. The same is true with regard to separate robbery victims, even though broadly speaking, the robberies were part of a single rampage.

Appellant further charges ineffective assistance of counsel during the guilty plea proceedings. Appellant contends that his attorney's advice to plead guilty constitutes ineffective assistance of counsel because conviction for crimes committed against the second victim were violative of double jeopardy. The contention is clearly without merit in light of our conclusion that appellant was not subjected to double jeopardy. See Dyer v. Crisp, 613 F.2d 275 (10th Cir.), cert. denied, 445 U.S. 945 (1980).

Likewise, appellant's final contention that by pleading guilty he did not waive his right to claim dismissal by reason of double jeopardy need not be addressed because of our determination that the double jeopardy clause is not applicable in this case.

The judgment of the district court is affirmed. The mandate shall issue forthwith.

IN THE DISTRICT COURT, OKLAHOMA COUNTY, OKLAHOMA

THE STATE OF OKLAHOMA,) DISTRICT COURT CASE NO.
)
Plaintiff) CRF-74-4417 & CRF-74-4416
)
vs.)
ALFRED X. BROOKS) COURT OF CRIMINAL APPEALS NO.
No. #91884)
Oklahoma State Penitentiary) _____
Address: P.O. Box 97 McAlester, Oklahoma 74501)
CITATION NO. _____

POST-CONVICTION FINDINGS
(Title 22, O. S. Supp. 1970, §1080 et seq)

Original Charge: CRF-74-4417 - ROBBERY WITH FIREARMS & CRF-74-4416 - ASSAULT & BATTERY WITH DEADLY WEAPON WITH INTENT TO KILL

Judgment and Sentence: TWENTY YEARS (20) IN EACH CASE UPON A PLEA OF GUILTY TO RUN CONCURRENTLY.

Application for Post-Conviction Relief filed: NOVEMBER 9, 1979

Response of District Attorney: JANUARY 22, 1980

Was form authorized by Court of Criminal Appeals used? A. YES

Proceeding in Court of Criminal Appeals, if any: NO

Is there a genuine issue of material fact? A. NO

Is an evidentiary hearing necessary? A. NO

Is the testimony of the trial Judge material to such a hearing? A. NO

Findings of fact: (see attached memo)

Conclusions of law: _____

Order DENIED Notice: You are entitled to appeal from this Order by filing, in writing, with the Clerk of this Court, within ten days from this date, your notice of Appeal.

Date: MARCH 7, 1980

(This order to be filed by the Clerk as part of the minutes in this case.)
Mailed to Petitioner this _____ day of _____, 19____.

Lynn Voiles
District Judge

March 80

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

ALFRED X. BROOKS, Petitioner,	)	
v.	)	Case No. CRF-74-4417 CRF-74-4416
THE STATE OF OKLAHOMA, Respondent.	)	

POST-CONVICTION RELIEF ORDER

Petitioner was charged in the District Court of Oklahoma County, Case Number CRF-74-4415, with Murder in the First Degree for the August 3, 1974, slaying of Judy Webb. Petitioner was granted a jury trial whereby he was found guilty of the charge and sentenced to death. Petitioner was also charged with Robbery With a Firearm and Assault and Battery With a Deadly Weapon With Intent to Kill, the victim in both being Karen Trantham, in Case Numbers CRF-74-4417 and CRF-74-4416 respectively, to which he pled guilty and was sentenced in both to twenty years imprisonment to run concurrently.

From the judgment and sentence in Case Number CRF-74-4415, Petitioner appealed to the Court of Criminal Appeals of the State of Oklahoma. In Opinion Number F-76-125, said Court of Criminal Appeals modified Petitioner's sentence of death to a sentence of life imprisonment, and otherwise affirmed the judgment of the trial court.

The Petitioner now comes forward, by way of his Application for Post-Conviction Relief, and asks the District Court of Oklahoma County, in which he was convicted, to vacate the sentences in Case Numbers CRF-74-4416 and CRF-74-4417. The crux of the Petitioner's most lengthy Application centers around three basic contentions:

(1) The denial of effective counsel;

(2) being coerced into entering his pleas of guilty, and;

(3) subjection to double jeopardy.

As to Petitioner's contention concerning his denial of effective counsel, the burden is on the accused to establish inadequate representation of counsel, and such burden is not sustained by simply pointing out possible errors in counsel's judgment or lack of success in the defense. Walker v. State, Okl. Cr., 550 P.2d 1339 (1976). The standard for measuring the adequacy of counsel is whether the trial was rendered a farce, mockery of justice or was shocking to the conscience of the reviewing court. Neither hindsight nor success is the proper measure. Hill v. State, Okl. Cr., 567 P.2d 516 (1977).

From a view of the court files in these cases and a review of the Petitioner's claims in his Application, a finding that defense was incompetent at trial or on direct appeal should not be forthcoming. Counsel at trial raised defenses and filed and argued motions that were proper under the facts and the circumstances. It cannot be said that the trial was a farce, mockery of justice or was shocking to the conscience of the reviewing court. Counsel for Petitioner on direct appeal raised all issues which in counsel's opinion were not frivilous and was so diligent in his appeal on behalf of the Petitioner that he was successful in having the sentence in CRF-74-4415, having been rendered by a jury, reduced from death to life imprisonment.

The State claims this Petitioner should not now be rewarded in any manner by merely excoriating a most competent and proficient attorney, E. Melvin Porter, by crying denial of effective legal representation, a cry on the lips of every inmate who sees a scintilla of a chance of escaping his confines.

The Petitioner's second major allegation, that of being coerced into entering pleas of guilty in CRF-74-4416 and

CRF-74-4417 is so meritless as to hardly require recognition, as evidenced by the transcript of proceedings, transcribed on the 10th of October, 1976, when the Petitioner entered his pleas of guilty before the Honorable Judge Theus. The transcript evidences that Judge Theus continually inquired during the proceedings whether the Petitioner's pleas was fully voluntary and free from coercion, to which the Petitioner repeatedly affirmed that his plea of guilty was being freely entered and was wholly void of any coercion.

The remainder of the Petitioner's most lengthy Application is dedicated to the allegation that he was subjected to double jeopardy in that his conviction in CRF-74-4415 barred subsequent prosecution in CRF-74-4416 and CRF-74-4417 because the crimes arose out of the same chain of events. This allegation fails in that the victim in CRF-74-4415 was a different person from the victim in CRF-74-4416 and CRF-74-4417 and therefore the privilege of immunity from double jeopardy does not arise. Petitioner was found guilty of having murdered Judy Webb in CRF-74-4415 and pleaded guilty to Robbery With a Firearm and Assault and Battery With a Dangerous Weapon With Intent to Kill, the victim being Karen Trantham in CRF-74-4417 and CRF-74-4416 respectively. As stated in De Laune v. State, Okl. Cr. 569 P.2d 463 (1977), if two crimes charged each require proof of at least one fact which is not required to be proved in the other, the defendant can be charged with both crimes. Therefore, since CRF-74-4415 involved a different victim from the victim in CRF-74-4416 and CRF-74-4417, the double jeopardy clause did not preclude the subsequent prosecution of the Petitioner for Robbery With a Firearm and Assault and Battery With a Deadly Weapon With Intent to Kill after his conviction for Murder In The First Degree.

Therefore, the Petitioner's Application for Post Conviction Relief is hereby denied.

RAYMOND NAIFEH
DISTRICT JUDGE

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAY 12 1980
Ross N. Lillard, Jr.
CLERK

ALFRED BROOKS,	)	
	)	
Appellant,	)	
	)	
-vs-	)	No. PC-80-178
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF

The appellant has asked this Court to reverse an Order of the District Court, Oklahoma County, denying him post-conviction relief, Case Nos. CRF-74-4417 and CRF-74-4416, on March 7, 1980.

The District Court found that the appellant had raised three basic contentions in his application, which are as follows: the denial of effective counsel; his coercion to plead guilty; and subjection to double jeopardy. The Court considered and rejected each claim in its March 7 Order.

After considering the issues raised on appeal and being fully advised in the premises, this Court finds that the denial of post-conviction relief should be and hereby is affirmed.

IT IS SO ORDERED.

WITNESS OUR HANDS, and the Seal of this Court, this _____ day of May, 1980.

TOM R. CORNISH, PRESIDING JUDGE

TOM BRETT, JUDGE

HEZ J. BUSSEY, JUDGE

ATTEST:

CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

FILED
NOV 20 1980
HERBERT T. HOPE
CLERK, U. S. DISTRICT COURT
DEPUTY

ALFRED BROOKS,	)	
	)	
Petitioner,	)	
	)	
-vs-	)	CASE NO. CIV-80-962-D
	)	
NORMAN B. HESS, Warden and JAN ERIC CARTWRIGHT, Attorney General of the State of Oklahoma,	)	
	)	
Respondents.	)	

OPINION AND ORDER

Petitioner is presently incarcerated at the Oklahoma State Penitentiary, McAlester, Oklahoma, pursuant to judgment and sentence entered in the District Court of Oklahoma County, Oklahoma in case number CRF-74-4415, in which petitioner was convicted of the crime of Murder in the First Degree and sentenced to death. Upon appeal, the judgment of conviction was affirmed, but the sentence modified to life imprisonment. Brooks v. State, 566 P.2d 147 (Okl. Cr. 1977). Subsequently, pursuant to pleas of guilty, petitioner was convicted of Assault and Battery With a Deadly Weapon With Intent to Kill (CRF-74-4416) and Robbery With Firearms (CRF-74-4417) and was sentenced to two concurrent twenty-year terms of imprisonment.

Petitioner attacked the latter convictions and sentences in an application for post-conviction relief under the Oklahoma Post-Conviction Procedure Act, 22 O.S. 1971 §§1080 et seq. on grounds of ineffective assistance of counsel, involuntary pleas of guilty, and double jeopardy. His application was denied in the Oklahoma County District Court and, on appeal to the Court of Criminal Appeals of the State of Oklahoma, the denial was affirmed. Petitioner thereafter brought this action, a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254.

Petitioner asserts four grounds for relief:

> "1 and 2. That the facts and circumstances in each of the two latter convictions are identical to those litigated in petitioner's earlier murder trial and that therefore they, and neither of them, were constitutionally prosecuted.
>
> 3. His guilty pleas did not waive his constitutional rights under the double jeopardy clause.
>
> 4. Ineffective assistance of counsel and coercion by counsel causing defendant to enter guilty pleas."

Petitioner has exhausted the remedies available to him under the laws of the State of Oklahoma.

A response has been filed in which it is urged that the double jeopardy provision of the United States Constitution is not applicable to petitioner's case, that petitioner's pleas of guilty were free and voluntary and that his counsel was not ineffective.

The facts which led to the three convictions were basically that petitioner and a "John Doe" picked up two girls, robbed them, took them into a field and shot both of them, killing one and wounding the other. The robbery and shooting of the first girl resulted in conviction of petitioner under the Oklahoma felony murder statute. The robbery and shooting of the second girl, who survived, were the basis of the charges upon which petitioner entered pleas of guilty and which he attacks in this action. He asserts here, as he did in his application for post-conviction relief in the District Court of Oklahoma County, that the subsequent convictions were barred by the double jeopardy provision because they arose out of the same chain of events. As was stated by the Oklahoma County District Judge, this contention must fail. The victim in the murder case was a different person from the victim in the robbery and assault cases, and the privilege of immunity from double jeopardy therefore does not arise.

In United States v. Jackson, 482 F.2d 1167 (10th Cir. 1973), the following reference appears:

". . . .'When each offense requires proof of a fact not essential to the other, the charges are not identical and the accused can be charged, tried and convicted of both offenses even though the charges arise out of the same act.' Goldsmith v. Cheney, 447 F.2d 624, 627 (10th Cir. 1971)."

In Harris v. Oklahoma, 433 U.S. 682 (1977), petitioner had been convicted under Oklahoma's felony murder statute and was later brought to trial and convicted of the felony which was the basis for the felony murder conviction. The second conviction was affirmed by the Court of Criminal Appeals of the State of Oklahoma, but reversed by the Supreme Court of the United States. In the Supreme Court opinion, the following is stated:

"When, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one."

In this case, had there been only one victim, or if the subsequent charges were based upon the robbery and the shooting of the girl whose death gave rise to the earlier felony murder conviction, Harris would bar the subsequent prosecutions. Here, however, the felony murder conviction was not, and could not have been, based upon the robbery and the shooting of the second girl, who did not die. Thus, the Double Jeopardy Clause does not bar subsequent prosecution for the offenses against that second victim.

Although petitioner does not specifically raise the issue, it should be noted that the Double Jeopardy Clause also does not bar a single trial for multiple offenses arising out of one transaction if each offense rests on different criminal elements. United States v. Jackson, supra; Smith v. Gaffney, 462 F.2d 663 (10th Cir. 1972).

Petitioner's third asserted ground for relief, that his guilty pleas did not waive his rights under the Double Jeopardy Clause, need not be addressed in view of the above determination that the Double Jeopardy Clause has no applicability to petitioner's case in any event.

APPENDIX D

Petitioner's final asserted ground for relief, that his counsel was ineffective and coerced him into pleading guilty, is patently without merit. The court has reviewed the transcript of proceedings in which his guilty pleas were entered and finds that the Oklahoma County District Judge exhaustively questioned petitioner and his counsel with regard to the voluntariness of the pleas, fully advised defendant of all of the rights guaranteed him by the United States Constitution which would be waived by the entry of guilty pleas and advised him that he was entitled to a jury trial, which the Judge was prepared to commence that day. The transcript makes it quite clear that defendant was fully aware of his rights, that he answered all questions coherently and in full, with obvious understanding of the meaning of the questions and of his answers to them. He was further advised of his right, within ten days, to apply to withdraw the pleas of guilty and, if that application was denied, of the right to petition the Court of Criminal Appeals of the State of Oklahoma for a writ of certiorari. Petitioner stated that he fully understood those rights. No such application or petition was subsequently filed.

Just as petitioner's pleas of guilty were clearly free and voluntary, his counsel was effective in representing him. Under Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980), counsel is effective in the constitutional sense if he exhibits "the skill, judgment and diligence of a reasonably competent defense attorney." In the circumstances of this case, the advice of his attorney that he plead guilty to the two charges in question here certainly does not indicate a lack of such skill, judgment or diligence. Neither does such advice constitute coercion in any sense.

Petitioner raises no questions of fact. Therefore, no evidentiary hearing is appropriate and none will be held. Based upon the foregoing, it is clear that petitioner's asserted grounds for

relief herein are without merit and that therefore his Petition for Writ of Habeas Corpus should be dismissed.

IT IS SO ORDERED.

DATED this 20 day of November, 1980.

Fred Daugherty

FRED DAUGHERTY
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

FILED

NOV 20 1980

HERBERT T. HOPE
CLERK, U. S. DIST. CT. COURT
DEPUTY

ALFRED BROOKS,

Petitioner,

-vs-

NORMAN B. HESS, Warden and JAN ERIC CARTWRIGHT, Attorney General of the State of Oklahoma,

Respondents.

CASE NO. CIV-80-962-D

JUDGMENT

Upon consideration of petitioner's Petition for Writ of Habeas Corpus and the court's Opinion and Order herein,

IT IS ORDERED, ADJUDGED AND DECREED that the Petition for Writ of Habeas Corpus be and the same hereby is dismissed.

DATED this 20 day of November, 1980.

Fred Daugherty

FRED DAUGHERTY
United States District Judge

ENTERED IN JUDGMENT DOCKET ON NOV 20 1980

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

FILED

NOV 26 1980

HERBERT T. HOPE
CLERK, U. S. DISTRICT COURT
BY [signature] DEPUTY

ALFRED BROOKS,	)	
	)	
Petitioner,	)	
	)	
-vs-	)	CASE NO. CIV-80-962-D
	)	
NORMAN B. HESS, Warden and JAN ERIC CARTWRIGHT, Attorney General of the State of Oklahoma,	)	
	)	
Respondents.	)	

O R D E R

Under date of November 20, 1980, this court entered its Opinion and Order and Judgment dismissing petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. Petitioner was furnished copies of the same by mail on that date. On November 21, 1980, there was filed herein Petitioner's Motion For Leave To File A Reply To The Respondent's Response which was verified under date of November 18, 1980.

Since this latter document was prepared and transmitted for filing prior to the entry of judgment in this case, its contents have been reviewed this court. Petitioner cites no authorities not considered by this court in reaching its original decision herein. The case of Harris v. Oklahoma, 433 U.S. 682 (1977) had not previously been cited by petitioner, but was discussed, and distinguished, in this court's Opinion and Order.

Petitioner's reply, being an integral part of his motion, will be permitted to be filed herein and will be treated as a Motion to Amend Judgment pursuant to Rule 59, Federal Rules of Civil Procedure. Inasmuch as the same contains no basis for any

change in this court's Opinion and Order dated November 20, 1980, the Motion to Amend Judgment will be denied.

IT IS SO ORDERED.

DATED this 28 day of November, 1980.

Fred Daugherty

FRED DAUGHERTY
United States District Judge

IN THE SUPREME COURT OF THE UNITED STATES

81 6171

ALFRED BROOKS,

Petitioner

v.

THE STATE OF OKLAHOMA, et. al.

RECEIVED
FEB 4 - 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Alfred Brooks, asks leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has previously been granted leave to so proceed in the U.S. Court of Appeals. Petitioner's affidavit in support of this motion is attached hereto.

/s/ Alfred Brooks

Alfred Brooks, #91884

AFFIDAVIT

I, Alfred Brooks, being first duly sworn according to law, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed?

No. Your petitioner is presently incarcerated and have been so incarcerated for approximately seven (7) years. His prison employment income is about eight (8) dollars per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source?

ANSWER: My relatives have sent me approximately one-hundred dollars in the past twelve months

3. Do you own any cash or checking or saving account?

ANSWER: No.

4. Do you own any real estate, stocks, bonds, notes automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

ANSWER: No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement for or answer to any questions in this affidavit will subject me to penalties for perjury.

/S/ [signature]

Alfred Brooks, #91884
Stringtown Correctional Center
P.O. Box 128
Stringtown, Okla. 74569

Subscribed and Sworn to Before
me this 1st day of February, 1982.
Notary Public: [signature]
My Commission Expire: _____

PROOF OF SERVICE

I, Alfred Brooks, did on this 2d day of Febru-ry, 1982, mail a true and correct copy of the foregoing Petition For Writ Of Certiorari to Attorney General, Jan Eric Cartwright, State Capitol Building, Oklahoma City, Oklahoma 73105, postage prepaid.

[signature]
Alfred Brooks, #91884

Opposition

RECEIVED
APR 22 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 81-6171

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

ALFRED BROOKS,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAN ERIC CARTWRIGHT
ATTORNEY GENERAL OF OKLAHOMA

CHARLES S. ROGERS
ASSISTANT ATTORNEY GENERAL
CHIEF, FEDERAL DIVISION

GLOYD L. McCOY
ASSISTANT ATTORNEY GENERAL

112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

ATTORNEYS FOR RESPONDENT

April, 1982

QUESTIONS PRESENTED

1. Does the number of victims of a criminal transaction determine the validity of the defense of double jeopardy and collateral estoppel?

2. Was Petitioner's plea of guilty involuntary?

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IN THE SUPREME COURT OF THE UNITED STATES
FEBRUARY TERM, 1982

ALFRED BROOKS,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 81-6171
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondents.	)	

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

The Respondent, by and through Jan Eric Cartwright, Attorney General of Oklahoma, respectfully requests that this Court deny issuance of a Writ of Certiorari to review the Opinion of the United States Court of Appeals for the Tenth Circuit entered December 21, 1981.

OPINION BELOW

The Opinion below is unreported but is appended hereto as Appendix "A".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in part:

> "No persons shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . . ."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides in part:

> Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 2, § 21, of the Oklahoma Constitution provides:

> "No person shall be compelled to give evidence which will tend to incriminate him, except as in this Constitution specifically provided; nor shall any person, after having been once acquitted by a jury, be put again in jeopardy of life or liberty for that of which he has been acquitted. Nor shall any person be twice put in jeopardy of life or liberty for the same offense."

Title 12 O.S. 1971, § 522, provides:

> "When the defendant shall have been convicted or acquitted upon an indictment or information, the conviction or acquittal is a bar to another indictment or information for the offense charged in the former, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that indictment or information."

STATEMENT OF THE CASE

On the evening of August 2, 1974, Karen Trantham and Judy Webb went to the Key Club on Northwest 10th Street in Oklahoma City, Oklahoma. They arrived at the Key Club at approximately midnight (Tr. 292). As they were leaving their car to go into the club, they were approached by two black males. The women were told to get back into their automobile (Tr. 294). The women were held at gunpoint while they were in the car. They were ordered to give the men what money they had and were then told to remove their clothes (Tr. 299). The car was driven to an isolated area in Oklahoma City (Tr. 300). The car was stopped and the women were put into the trunk of the car. The two men then began driving for a period of time. Subsequently, the vehicle was stopped, the trunk opened and the two women were ordered from the trunk. One of the men (identified as Alfred Brooks) accompanied the two women across a bar ditch and through a fence. After walking some twenty or thirty feet, Brooks dropped back behind the women and began shooting (Tr. 304). Karen Trantham was shot in the left hand, the face, the neck and the back by the defendant (Tr. 305). Judy Webb was also shot. Judy was fatally wounded. Karen lay silent pretending to be dead until the two men drove away. Thereafter, she sought aid from a nearby house (Tr. 306).

Based on the preceding events, Petitioner was charged in the District Court of Oklahoma County, State of Oklahoma, Case No.

CRF-74-4415, with Murder in the First Degree for the August 3, 1974, slaying of Judy Webb. Petitioner was granted a jury trial wherein he was found guilty of the charge and sentenced to death. Upon appeal to the Oklahoma Court of Criminal Appeals, the judgment and conviction was affirmed, but the sentence was modified to life imprisonment. Brooks v. State, 566 P.2d 147 (Okl.Cr. 1977). Subsequently, pursuant to pleas of guilty, Petitioner was convicted of Assault and Battery with a Deadly Weapon with Intent to Kill (CRF-74-4416) and Robbery with Firearms (CRF-74-4417). These charges were in relation to victim Karen Trantham.

Petitioner attacked the latter convictions and sentences in an application for post-conviction relief under the Oklahoma Post-Conviction Procedures Act, 22 O.S. 1971, § 1080 et seq., on grounds of ineffective counsel, involuntary pleas of guilty and double jeopardy. His application was denied in the Oklahoma County District Court; and on appeal to the Court of Criminal Appeals of the State of Oklahoma (Case No. PC-80-178), the denial was affirmed. Petitioner subsequently filed a petition for Writ of Habeas Corpus in the United States District Court for the Western District of Oklahoma (Case No. CIV-80-962-D). The District Court dismissed the action. Petitioner appealed this decision to the United States Court of Appeals for the Tenth Circuit (Case No. 80-2322). The Court of Appeals affirmed the judgment of the District Court.

SUMMARY OF ARGUMENT

The Court should not grant a Writ of Certiorari to hear this case. Petitioner's due process and collateral estoppel claims are nothing more than a rehash of well settled legal principles. Petitioner presents no unique fact situation that this Court needs to apply to the principles. Even if the Court were to hear the case, it is clear that Petitioner is not entitled to the protection of the Double Jeopardy Clause or the doctrine of collateral estoppel. Even though the crimes as to the two victims arose out of a single criminal transaction, there are different facts and elements that must be proven in each situation. Therefore, jeopardy did not attach after the first trial relating to the

first victim. Collateral estoppel bars only the reintroduction or relitigation of facts already established against the government. Therefore, since the Petitioner was found guilty at the first trial, collateral estoppel is inapplicable.

The Petitioner's plea of guilty was voluntarily and knowingly made. Petitioner did not prove that his counsel was ineffective by applying the standard applicable to attorneys when their client pleads guilty. The lower courts have analyzed the facts and the procedures at the hearing and have concluded that Petitioner arguments have no merit. Accordingly, since Petitioner has failed to show why their review is incorrect, this Court should not hear his argument.

REASONS FOR DENYING WRIT OF CERTIORARI

I.

PETITIONER IS NOT ENTITLED TO PROTECTION FROM THE DOUBLE JEOPARDY CLAUSE OR FROM THE DOCTRINE OF COLLATERAL ESTOPPEL.

Petitioner asserts that he was denied protection from the Double Jeopardy Clause and from the doctrine of collateral estoppel. Petitioner's argument is based on the fact that there were multiple victims in a single criminal transaction. The Respondent will maintain that the law in this area is well settled. The Court would not be breaking new ground by hearing the case. Basically, Petitioner is asking the Court to apply in his case rules that have been consistently applied. Petitioner's fact situation is not unique. Therefore, all the Court would be doing, by hearing this case, would be applying a common fact situation to well settled law. This Court would only be doing again what the lower courts have already done.

The Oklahoma rule is well settled that where there are multiple victims, crimes against each, though committed in rapid succession, nevertheless constitute separate offenses. In Orcutt v. State, 52 Okl.Cr. 167, 3 P.2d 912 (1931), the Court held that the robbing of two persons in an automobile in succession constituted two separate offenses. In Fay v. State, 62 Okl.Cr. 350, 71 P.2d 768 (1937), it was ruled that where several children were

struck by the defendant's automobile at the same time, conviction of assault with intent to kill one child was not a bar under the double jeopardy provision of the Constitution for prosecution for assault to kill others. In Jennings v. State, 506 P.2d 931 (Okl.Cr. 1973), the defendant who stabbed two persons was properly held to answer to two charges of assault and battery with a dangerous weapon, even though the offense arose out of the same transaction. In Clay v. State, 593 P.2d 509 (Okl.Cr. 1979), the Court held that offenses committed against different individual victims are not the same for double jeopardy and dual punishment purposes even though they arise from the same episode or transaction.

In the present case, Petitioner is asserting that the number of victims does not necessarily determine the validity of the double jeopardy claim. Respondents will maintain that the proper test to be utilized in determining double-jeopardy consequences was spelled out in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 16 L. Ed. 2d 306 (1932). In Blockburger, this Court stated the standard by which to determine whether one offense or multiple offenses resulted from particular conduct as follows:

> ". . . The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. . . ." Id. at 304, 52 S. Ct. at 182, 76 L. Ed. at 309.

In Draper v. State, 562 P.2d 155 (Okl.Cr. 1977), the Court held that to validly assert the double jeopardy claim, it must be shown that the two offenses charged are in law and in fact the same offense; offenses are not the same if on trial for one, proof of an additional fact is required that is not necessarily to be proved in the trial of the other although the same acts may be necessary to be proved in trial of each. It is apparent that Oklahoma follows the Blockburger test. The key to Petitioner's claim is whether or not there is an additional fact that would have had to have been proven if Petitioner had gone to trial on the charges concerning the second victim.

In Goldsmith v. Cheney, 447 F.2d 624 (10th Cir. 1971), citing Blockburger, supra, the Court stated:

> "Generally, to sustain a plea of double jeopardy it must be shown that both prosecutions are for the same offense. The test for identity of offenses is whether the same evidence is required to sustain each offense. [Citations omitted] When each offense requires proof of a fact not essential to the other, the charges are not identical and the accused can be charged, tried and convicted of both offenses even though the charges arise out of the same acts. . . ." 447 F.2d at 627.

It is apparent that the facts in the present case established that proof of an additional fact is necessary in the second situation. In his first trial, it was necessary for the prosecution to establish that Petitioner robbed Judy Webb and then shot and killed her. If the second trial had taken place, instead of terminating because of Petitioner's plea of guilty, it would have been necessary for the prosecution to prove that the Petitioner robbed Karen Trantham and then shot and wounded her. The test is obviously satisfied for no other reason than because of one additional fact or element that would have to be proven, viz., that the Petitioner committed the acts on Karen instead of Judy. An unnecessary element in the case concerning Karen is the death of Judy. In United States v. Haili, 443 F.2d 1295 (9th Cir. 1971), the Court held that the test is not whether all counts grew out of a single transaction but rather whether the evidence to support the counts is different. In the present case, it is apparent that even though the crimes may have arisen out of the same series of transactions, each offense requires some fact or element not required to establish the other. See, Brown v. Alabama, 619 F.2d 376 (5th Cir. 1980); United States v. Larsen, 596 F.2d 410 (10th Cir. 1979); United States v. Gardner, 579 F.2d 474 (8th Cir. 1978), cert. denied, 429 U.S. 734, 97 S. Ct. 734, 50 L. Ed. 2d 749; United States v. Cantu, 557 F.2d 1173 (5th Cir. 1977), reh. denied, 561 F.2d 831, cert. denied, 434 U.S. 1063, 98 S. Ct. 1236, 55 L. Ed. 2d 763 (1978); United States v. Bernstein, 533 F.2d 775 (2d Cir. 1976), cert. denied, 429 U.S. 998, 97 S. Ct. 523, 50 L. Ed. 2d 608.

The Petitioner has not shown that the offenses are the same in both law and fact and, accordingly, has not shown that the Double Jeopardy Clause has been violated. See, United States v. Crew, 538 F.2d 575 (4th Cir. 1976), cert. denied, 429 U.S. 852, 97 S. Ct. 144, 50 L. Ed. 2d 127 (1976). The purpose of state and federal constitutional provisions prohibiting placing a person twice in jeopardy is to protect the person from being prosecuted repeatedly for the same offense until a conviction is obtained and is not to provide a method of carte blanche extending to the accused the prerogative of committing as many offenses as he desires within the same transaction with a protective shield permitting only one prosecution to arise and be pursued from that transaction. To permit such a procedural prohibition would indeed be contra to the general concept that penal statutes are imposed in part with the intent of deterring criminal offenses. Hill v. State, 511 P.2d 604 (Okl.Cr. 1973). Since Petitioner's fact situation does not fit into the situation designed to be protected by the double jeopardy clause, his petition for writ of certiorari should be denied.

Petitioner also presents the issue of collateral estoppel in support of his petition for writ of certiorari. Petitioner's reliance on Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), is somewhat misplaced. In Ashe, supra, the Supreme Court stated:

> "The question is not whether Missouri could validly charge the petitioner with six separate offenses for the robbery of six poker players. It is not whether he could have received a total of six punishments if he had been convicted in a single trial of robbing the six victims. It is simply whether, after a jury determined its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again." 25 L. Ed. 2d at 477.

In United States v. Mock, 604 F.2d 341 (5th Cir. 1979), the Court stated:

> "In principle, the law of collateral estoppel is clear . . . According to Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), collateral estoppel 'means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated

> between the same parties in any future lawsuit.' Id. at 443, 90 S.Ct. at 1194. Thus, Ashe mandates two inquiries: First, what facts were necessarily determined in the first law suit? See United States v. Ballard, 586 F.2d 1060 (5th Cir. 1978); Adams v. United States, 287 F.2d 701 (5th Cir. 1961). Second, has the government in any subsequent trial tried to relitigate facts necessarily established against it in the first trial? . . . ." (Emphasis added)

It is apparent that the rule of collateral estoppel with regard to criminal proceedings is limited to circumstances in which the accused is acquitted in a prior prosecution for an offense arising out of the same transaction. Hill v. State, supra. Collateral estoppel bars only the reintroduction or relitigation of facts already established against the government. United States v. Mock, supra at 343. Since the doctrine of collateral estoppel is not applicable to a situation, as in the present case, where petitioner was found guilty, the writ of certiorari should be denied.

II.

PETITIONER'S PLEA OF GUILTY WAS MADE VOLUNTARILY AND KNOWINGLY. PETITIONER WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner claims that his guilty plea was involuntary due to the deprivation of reasonable and effective assistance of counsel. He claims that his defense attorney gave him persistent advice to plead guilty. There is no reason for this Court to review these arguments. The facts of the case and the proceedings of the hearing where Petitioner entered his plea of guilty have been thoroughly examined by the lower courts. These arguments have been presented to the Oklahoma courts on post-conviction relief applications. These arguments have been argued to the United States District Court for the Western District of Oklahoma and the Tenth Circuit Court of Appeals. These courts have all been in agreement that Petitioner's plea of guilty was entered voluntarily and that he was not denied effective legal representation. Petitioner presents no justifiable legal reason why the rulings of the lower court should be put aside and his arguments heard one more time. The Respondent will maintain that even if this Court decides to hear the arguments, the facts and existing

law will clearly indicate that the lower courts' analyses of Petitioner's arguments are correct.

During the hearing, Petitioner was informed of the charges against him (Tr. 4). Petitioner was questioned about any medication he might be taking (Tr. 5). Petitioner was told the punishment if he was found guilty of the crimes (Tr. 6). Petitioner was informed of his right to a trial by jury and right to confront the witnesses who testified against him (Tr. 7). Petitioner was told that he waives the right to a jury trial if he plead guilty (Tr. 7). Petitioner was told of his right against self-incrimination and that the law presumed him to be innocent of the charges against him (Tr. 8). Petitioner stated that he understood all of his rights (Tr. 9). During the hearing, Petitioner was told how he would be sentenced if he pled guilty (Tr. 10, 11). Petitioner stated that no one had tried to force him to plead guilty (Tr. 13). From these preceding facts, and from a reading of the entire hearing transcript, it is apparent that the Petitioner was well aware of the consequences of entering a plea of guilty. Petitioner was even told how he could withdraw his guilty plea (Tr. 11, 21).

The law with respect to guilty pleas is well settled. Before accepting a guilty plea, the trial judge must be convinced that the defendant's decision is voluntary in the sense that it is made knowingly, intelligently, and not as a result of coercion by the State or anyone else. Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 1711, 23 L. Ed. 2d 274 (1969). Where a defendant in guilty plea proceedings denies the presence of any promises, threats or coercion and assures the court of the voluntariness of his plea, the truth and accuracy of his statements should be regarded as conclusive in the absence of a believable reason justifying departure from their apparent truth. United States v. Bambulas, 571 F.2d 525 (10th Cir. 1978); Hedman v. United States, 527 F.2d 20 (10th Cir. 1975). To allow the Petitioner to make statements at the guilty plea hearing and then years later allow him to repudiate them would make a mockery of the entire proceeding.

Petitioner maintains that he was denied effective counsel. Consideration of the question of whether a defendant was adequately represented by counsel in a criminal prosecution should be considered in light of whether he plead guilty or not guilty, since more is required of counsel if the plea was not guilty. Lamb v. Beto, 423 F.2d 85 (5th Cir. 1970). When a person indicates a desire to enter a plea of guilty, the duty of counsel is limited to ascertaining whether the decision so to plead is voluntarily and knowingly made. Brown v. Jernigan, 622 F.2d 914 (5th Cir. 1980). Also, a guilty plea should not be rendered involuntary because it is entered upon the advice of competent counsel that it would be to the accused's advantage to do so. Langkeit v. Oklahoma, 414 F. Supp. 870 (W.D. Okl. 1976). Considering the nature of the crime and the circumstances in this case, an attorney's advice to plead guilty hardly demonstrates a lack of skill, judgment and diligence of a reasonable and competent defense attorney.

CONCLUSION

For the reasons stated, Respondent respectfully requests the Court to deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

JAN ERIC CARTWRIGHT
ATTORNEY GENERAL OF OKLAHOMA

Charles S. Rogers

CHARLES S. ROGERS
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ATTORNEYS FOR RESPONDENT

AFFIDAVIT OF SERVICE

STATE OF OKLAHOMA)
: ss.
COUNTY OF OKLAHOMA)

Charles S. Rogers, being first duly sworn, upon his oath does state:

1. That I am an Assistant Attorney General for the State of Oklahoma and one of the attorneys of record in the above-styled case representing the Respondent, State of Oklahoma.

2. That on April 21, 1982, I caused to be placed ten (10) copies of the above Respondent's Brief in Opposition to Petition for Writ of Certiorari in an envelope properly addressed to the Clerk of this Court, with postage prepaid, which was deposited in the United States Mail in Oklahoma City, Oklahoma.

3. Copies of the foregoing Response were mailed, postage prepaid, to:

Alfred Brooks, #91884
Stringtown Correctional Center
P. O. Box 128
Stringtown, OK 74569

4. All parties required to be served have been served.

Further, Affiant sayeth not.

Charles S. Rogers
CHARLES S. ROGERS

Subscribed and sworn to before me this 21st day of April, 1982.

Martha A. Inman
NOTARY PUBLIC

My Commission Expires:
September 14, 1985

Appendix

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
DEC 21 1981
HOWARD K. PHILLIPS
Clerk

ALFRED BROOKS,

Petitioner-Appellant,

v.

NORMAN B. HESS, Warden and JAN ERIC CARTWRIGHT, Attorney General of the State of Oklahoma,

Respondents-Appellees.

No. 80-2322

Appeal from the United States District Court
For the Western District of Oklahoma
(D. C. No. Civil 80-962-D)

Submitted on the briefs pursuant to Tenth Circuit Rule 9:

Alfred Brooks, pro se.

Jan Eric Cartwright, Attorney General, and Michael Avant-Pybas, Assistant Attorney General, the State of Oklahoma, Oklahoma City, Oklahoma, for Respondents-Appellees.

Before BARRETT, HILL and McKAY, Circuit Judges.

PER CURIAM.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this

APPENDIX A

appeal. See Fed. R. App. P. 34(a); Tenth Circuit R. 10(e). The cause is therefore ordered submitted without oral argument.

This is an appeal from an order of the district court for the Western District of Oklahoma dismissing appellant's petition for a writ of habeas corpus.

The basic facts are not in dispute. Appellant and a "John Doe" picked up two girls, robbed and shot them, killing one and wounding the other.

Appellant was tried by a jury, convicted of felony-murder with respect to the first victim and sentenced to life imprisonment. That conviction is not challenged here. Subsequently appellant was convicted upon a guilty plea of assault and battery with intent to kill the second victim, and an additional charge of robbery with firearms as to the second victim who survived the attack.

After exhausting state remedies, appellant instituted habeas corpus proceedings in the district court claiming that the second convictions were barred by double jeopardy, that his attorney provided ineffective assistance of counsel, and that, by pleading guilty, he did not waive his right to claim double jeopardy. The district court denied relief and this appeal followed.

Appellant first argues that the subsequent convictions for assault and battery and robbery were barred by double jeopardy because he contends that they arose out of the same continuous act which resulted in the prior conviction for felony-murder. In Blockburger v. United States, 284 U.S. 299 (1932), the Supreme Court held that the test for identity of

offenses is whether the same evidence is required to sustain each offense. Where each offense requires proof of a fact not essential to the other, an accused may be convicted of both offenses, though the charges arise out of the same acts. Id. See also Goldsmith v Cheney, 447 F.2d 624 (10th Cir. 1971). It is clear that the crimes committed against the second victim do not fall within the double jeopardy standards spelled out in Blockburger. It is obvious that the elements required to convict for assault and battery with intent to kill committed against a second victim are not the same as those required to sustain a conviction for the felony-murder of the first victim. The same is true with regard to separate robbery victims, even though broadly speaking, the robberies were part of a single rampage.

Appellant further charges ineffective assistance of counsel during the guilty plea proceedings. Appellant contends that his attorney's advice to plead guilty constitutes ineffective assistance of counsel because conviction for crimes committed against the second victim were violative of double jeopardy. The contention is clearly without merit in light of our conclusion that appellant was not subjected to double jeopardy. See Dyer v. Crisp, 613 F.2d 275 (10th Cir.), cert. denied, 445 U.S. 945 (1980).

Likewise, appellant's final contention that by pleading guilty he did not waive his right to claim dismissal by reason of double jeopardy need not be addressed because of our determination that the double jeopardy clause is not applicable in this case.

The judgment of the district court is affirmed. The mandate shall issue forthwith.

APPENDIX A